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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No.

COLUMBIA HOSPITAL FOR WOMEN AND LYING-IN ASYLUM, a corporation, *Petitioner,*

v.

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of the Columbia Hospital for Women and Lying-in Asylum, a corporation, respectfully shows:

SUMMARY STATEMENT OF MATTER INVOLVED.

The petitioner, appellant below and plaintiff in the Trial Court (hereinafter called "plaintiff"), prays a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit en-

tered in the above cause on March 15, 1951, by a divided court, affirming a decree of the United States District Court for the District of Columbia entered on December 5, 1949, limiting plaintiff's recovery from respondent (hereinafter called "defendant"), on a Blanket Position Bond issued to plaintiff by defendant to $5,000.00, whereas plaintiff claimed $18,975.47. (R. 4, 26)

The Blanket Position Bond was delivered by defendant to plaintiff on or about March 17, 1942, whereby defendant, in consideration of an annual premium paid by plaintiff, agreed to indemnify plaintiff against any loss sustained by plaintiff through dishonest acts committed by its bookkeeper, but not in excess of $5,000.00 in any one year. In consideration of payment of premiums by plaintiff, defendant renewed the bond, and its agreement of indemnity, for a term expiring March 17, 1943, 1944, 1945, 1946 and for a three year term expiring 1949. Plaintiff sustained a loss through the dishonest acts of its bookkeeper during the year 1945 in the amount of $5,498.32, during the year 1946 in the amount of $3,975.47, during the year 1947 in the amount of $13,281.45, and during the year 1948 in the amount of $17,555.90. Plaintiff made claim against the defendant for $18,975.47, being $5,000.00 for loss sustained in each of the years 1945, 1947 and 1948, and $3,975.47 for the loss sustained during the year 1946. Plaintiff discovered its loss in the year 1948.

Defendant denied liability in any amount in excess of the $5,000.00 penalty in its bond.

BASIS FOR THIS COURT'S JURISDICTION.

The judgment sought to be reviewed was rendered by the United States Court of Appeals for the District of Columbia Circuit and is dated March 15, 1951.

The United States Court of Appeals for the District of Columbia Circuit has rendered a decision (of first instance in this jurisdiction) in conflict with decisions of other Circuit Courts of Appeal on the same matter.

The jurisdiction of the Court is invoked under Title 28 U.S.C.A., Section 1254(1) and 2101(c).

QUESTIONS PRESENTED.

1. Does the Blanket Position Bond create as to any employee covered by it a single and continuous liability limited by the amount specified as the coverage upon each employee without regard to the length of time the bond is in force, or does it create a separate and distinct liability for each successive renewal period of twelve months during the time of coverage?

2. Are the provisions in the bond which attempt to limit the surety's liability by such terms as "liability shall not be cumulative in amounts" and the provisions of a rider that losses under the rider "shall, in no event, exceed in the aggregate the amount carried under the attached bond", so drawn as to require interpretation and to be fairly susceptible of more than one construction?

REASONS FOR ALLOWANCE OF THE WRIT.

1. The decision conflicts with the decisions of other Federal Courts which have held that a renewal of a fidelity bond is a separate and distinct contract for each renewal period and that the surety is liable for losses occurring in each renewal period.

Florida Cent. & P. Ry. v. *American Surety Co. of N. Y.*, 99 Fed. 674 (C.C.A. 2); *Proctor Coal Co.* v. *United States Fidelity & Guaranty Co.*, (C.C.N.D. Ga.) 124 Fed. 424; *Maryland Casualty Co.* v. *Bank*, 246 Fed. 892 (C.C.A. 5), (cert. den. 246 U. S. 670); *Maryland Casualty Co.* v. *Tulsa Loan Co.*, 83 F. (2d) 14 (C.C.A. 10), 105 A.L.R. 529; *Aetna Casualty & Surety Co.* v. *Commercial State Bank*, (D.C.E.D. Ill.) 13 F. (2d) 474, (reversed on other grounds, 19 F. (2d) 969 (C.C.A. 7)); *Globe Indemnity Co.* v. *Wolcott & Lincoln*, 152 F. (2d) 545 (C.C.A. 8); *United States* v. *American Surety Co. of N. Y.*, 172 F. (2d) 135 (C.C.A. 2), (cert. den. 337 U. S. 930).

2. The decision conflicts with the decisions of other Federal Courts which have held that provisions against liabil-

ity, such as not exceeding a specified amount or not being cumulative, are invalid and of no effect, in that the liability under the original bond and liability under a renewal bond are not cumulative but are separate liabilities, for separate amounts, under separate contracts of insurance. In these cases, the Courts have held that to decide otherwise would permit the surety to accept a full premium while giving nothing in return.

Aetna Casualty & Surety Co. v. *Commercial State Bank, supra; Md. Casualty Co.* v. *Tulsa Loan Co., supra; Globe Indemnity Co.* v. *Wolcott & Lincoln, supra; United States* v. *American Surety Co. of N. Y., supra;* See 11 APPLEMAN, INSURANCE LAW AND PRACTICE, 660 *et seq.;* RENEWAL BONDS, Sec. 6769, ANNOTATION, 7 A.L.R. (2d) 946, *et seq.*

3. Other Federal Courts have held that a renewal bond is a continuous liability, limited to the provisions of the original bond.

United States Fidelity & Guaranty Co. v. *Barber,* 70 F. (2d) 220 (C.C.A. 6); *Leonard* v. *Aetna Casualty & Surety Co.,* 80 F. (2d) 205 (C.C.A. 4); *Brulatour* v. *Aetna Casualty & Surety Co.,* 80 F. (2d) 834 (C.C.A. 2); *Hack* v. *American Surety Co. of N. Y.,* 96 F. (2d) 939 (C.C.A. 7); *Aetna Casualty & Surety Co.* v. *First National Bank,* 103 F. (2d) 977 (C.C.A. 3); *New York Casualty Co.* v. *Ford,* 145 F. (2d) 599 (C.C.A. 5); *Montgomery Ward & Co.* v. *Fidelity & Deposit Co. of Md.,* 162 F. (2d) 264 (C.C.A. 7).

4. Since Courts whose opinions are entitled to great weight have placed differing constructions on the provision against cumulative liability, it is, therefore, clear that defendant's attempt to limit its liability by provisions against cumulative liability is ambiguous and susceptible of more than one interpretation.

In the face of the mass of conflicting opinions, it cannot be said, as the Trial Court held and as the Lower Court affirmed, that the insurer-defendant, as a matter of law, has plainly, without ambiguity, limited its liability to $5,000.00 throughout the period 1942 to 1949.

First Nat. Bank v. *Hartford Fire Ins. Co.*, 95 U. S. 673, 24 L. ed. 563; *Thompson* v. *Phenix Ins. Co.*, 136 U. S. 287, 34 L. ed. 408; *American Surety Co. of N. Y.* v. *Pauly*, 170 U. S. 133, 42 L. ed. 977; *Hartford Accident & Indemnity Co.* v. *Swedish Methodist Aid Assn.*, 92 F. (2d) 649 (C.C.A. 7); *Pennsylvania Indemnity Fire Corp.* v. *Aldridge*, 73 App. D. C. 161, 117 F. (2d) 774; *Carter* v. *Provident Ins. Co.*, 74 U. S. App. D. C. 348, 122 F. (2d) 960; *Stinson* v. *New York Life Ins. Co.*, 83 U. S. App. D. C 115, 167 F (2d) 233; *Hayes* v. *Home Life Ins. Co.*, 83 U. S. App. D. C. 110, 168 F. (2d) 152; *Phoenix Mutual Life Insurance Co.* v. *Flynn*, 83 U. S. App. D. C. 381, 171 F. (2d) 982.

5. The national importance of the fidelity bonding business is clearly indicated by the facts that in 1944 total income to all companies for this kind of bond was $84,000,000., having risen from $20,000,000. in 1910. FIFTY YEARS OF SURETYSHIP AND INSURANCE, FITZPATRICK & BUSE, p. 92 (U.S. F. & G. Publication, 1946). The average of claims of this character, including adjustment expenses over the fifty-year period ending in 1945 was $544,725,863.; the number of claims, 4,768,620. *idem.* p. 164.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No.

COLUMBIA HOSPITAL FOR WOMEN AND LYING-IN ASYLUM, a corporation, *Petitioner,*

v.

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation, *Respondent.*

BRIEF IN SUPPORT OF FOREGOING PETITION FOR WRIT OF CERTIORARI.

OPINIONS DELIVERED BELOW.

The United States District Court for the District of Columbia entered an order granting a summary judgment for defendant, which appears at R. 26, 27.

The opinion of the United States Court of Appeals for the District of Columbia Circuit is unreported but appears in advance sheet opinion, Docket No. 10,522. (R. 28-36)

GROUNDS FOR JURISDICTION.

Grounds for jurisdiction have been stated in the petition under Basis for This Court's Jurisdiction, p. 2, and Reasons for Allowance of the Writ, p. 3.

The case presents an important question relating to the interpretation and construction of certain ambiguous phrases contained in a Blanket Position Bond issued by an insurer for the purpose of indemnifying an employer for defalcations committed by an employee.

STATEMENT OF THE CASE.

Defendant issued in favor of plaintiff a Position Schedule Bond, No. 1012-03-325-41, effective as of March 17, 1941. (R. 16)

On March 5, 1942, defendant issued to plaintiff a Blanket Position Bond, No. 1012-06-303-42, whereby defendant agreed to indemnify plaintiff against any loss which plaintiff should sustain through dishonest acts committed by its bookkeeper. (R. 8)

By a superseded suretyship Rider, Fidelity Form 337, issued March 5, 1942, (R. 15) attached to Blanket Position Bond, No. 1012-06-303-42, the Position Schedule Bond, No. 1012-03-325-41, issued March 17, 1941, was cancelled.

On March 7, 1942, defendant, through its local agent, Ralph W. Lee & Company, billed plaintiff for Blanket Position Bond, No. 1012-06-303-42, said bill specifically stating that the "term" of the bond was for "1 yr" and the "expiration" date of the bond was stated as "3/17/43" (R. 22), amount of policy $2,500.00, excess $25,000.00.

Similar statements were forwarded by Ralph W. Lee & Company to plaintiff on March 31, 1944, for a "term 1 yr", "expiration 3/17/45" (R. 23); on March 17, 1945, "term 1 yr expiration 3/17/46", (R. 20), accompanied by a letter from defendant's agent, Ralph W. Lee & Company, stating: "We take pleasure in enclosing herewith statement showing the renewal of the above captioned bond (#1012-06-303-42) for another year from March 17, 1945 to March 17, 1946." (R. 20); and on March 5, 1946, a statement for a "term 3 yrs expiration 3/17/49" (R. 24). A three-year Premimum Rider (R. 25) was attached to Bond No. 1012-06-303-42, as indicated in letter from Ralph W. Lee & Company. (R. 24)

On December 14, 1948, plaintiff discovered that one Frank R. Jenkins, its bookkeeper, had committed dishonest acts by embezzling plaintiff's funds over a period of four years in the following amounts:

During 1945	$ 5,498.32
During 1946	3,975.47
During 1947	13,281.45
During 1948	17,555.90

Plaintiff demanded of defendant $18,975.47, that amount being indemnity in the amount of $5,000.00 for each of the years 1945, 1947 and 1948, and $3,975.47 for the year 1946, and, on defendant's statement that its liability was limited to $5,000.00, plaintiff filed an action in the United States District Court for the District of Columbia to recover $18,975.47. (R. 2, 3, 4)

After defendant filed its answer denying liability in excess of $5,000.00 (R. 4, 5) plaintiff filed a Motion for Summary Judgment for the admitted part of defendant's liability, $5,000.00. (R. 5, 6)

Defendant then filed a Motion for Summary Judgment requesting the Court to enter judgment limiting its liability to $5,000.00 only (R. 6), to which plaintiff filed an affidavit in opposition. (R. 7, 8)

The Trial Court granted defendant's Motion for Summary Judgment (R. 26, 27) limiting plaintiff to recovery of $5,000.00 only.

The United States Court of Appeals for the District of Columbia Circuit on March 15, 1951, affirmed the judgment of the District Court, by a divided court, (Circuit Judge Clark dissenting) on the grounds (1) that the bond provided for (a) a continuing term, rather than an annual one, (b) an express provision against cumulation; (2) there was no genuine issue of material fact, simply a question of law for the court; (3) there was no ambiguity in the language of the bond requiring a construction of "cumulative liability"; (4) that the weight of authority is in favor of the

surety companies; (5) that courts have consistently held liability to be limited, in the aggregate, to the amount stated in the bond.

ASSIGNMENT OF ERRORS.

The United States Court of Appeals for the District of Columbia Circuit erred:

1. In holding that the renewal bond provided for a continuing term, rather than an annual one.

2. In failing to hold that the renewal bond was a separate and distinct contract for each renewal period.

3. In holding that the defendant's liability is limited, in the aggregate, to the amount stated in the bond.

4. In holding that the Superseded Suretyship Rider prohibited cumulative liability under the new bond.

5. In failing to hold that there was ambiguity in the language of the bond and in not interpreting the phrase "shall not be cumulative" in favor of the plaintiff.

SUMMARY OF ARGUMENT.

1. Many Federal Courts, equal in authority to those cited in the decision appealed from, have taken the view that a renewal bond is a separate and distinct contract for each renewal period and that the surety is liable for losses occurring in each renewal period. See cases cited in Reasons for Allowance of the Writ, petition, p. 3.

2. Many Courts have held that provisions against liability, such as not exceeding a certain amount or not being cumulative, are invalid and of no effect, in that the liability under the original bond and the liability under a renewal bond are not cumulative, but are separate liabilities, for separate amounts, under separate contracts of insurance. See cases cited in Reasons for Allowance of the Writ, petition, p. 3, 4.

SPOTS ON PAGES

3. Some Courts have held that a renewal bond is a continuous liability, limited to the provisions of the original bond. See cases cited in Reasons for Allowance of the Writ, petition, p. 4.

4. The Superseded Suretyship Rider 337 had no application to losses occurring during the periods covered by the original 1942 bond and renewals thereof. As the Rider applied only to the 1941 bond, cancelled by virtue of said Rider, it cannot be held to vary the terms of the bond to which it is attached, and can have no effect on recovery permissible under the bond in suit. *Globe Indemnity Co.* v. *Wolcott & Lincoln,* 152 F. (2d) 545 (C.C.A. 8); *Maryland Casualty Co.* v. *Tulsa Loan Co.,* 83 F. (2d) 14 (C.C.A. 10, 105 A.L.R. 529); *Hartford Accident & Ins. Co.* v. *Collins-Dietz-Morris Co.,* 80 F. (2d) 441 (C.C.A. 10).

5. The statements rendered, and the letters addressed, to plaintiff by defendant, through its agents, Ralph W. Lee & Company, clearly indicate that each renewal protected plaintiff for a definite period and specifically indicated the expiration date of the term of coverage. (R. 20-24)

6. That provision against cumulative liability is not without ambiguity is evidenced by the fact that Courts have sharply differed as to the construction to be placed upon such language, including the judges rendering the decision appealed from. It is a well-known principle of law that, if a policy is so drawn as to require interpretation and to be fairly susceptible of two different constructions, the one will be adopted that is most favorable to the insured, and the object to insure against loss should not be defeated by any narrow interpretation of its provisions. See cases cited in Reasons for Allowance of the Writ, petition, pp. 4, 5.

7. It is unreasonable to suppose that, when plaintiff paid one year's premium for one year's insurance of $5,000.00 as a protection against loss, and at the expiration of a one-year term, paid the premium for the following year and

years, it was not to receive the protection paid for. *Aetna Casualty & Surety Co.* v. *Commercial State Bank* (D.C.E.D. Ill.), 13 F. (2d) 474, (reversed on other grounds 19 F. (2d) 969 (C.C.A. 7)); *Maryland Casualty Co.* v. *Bank*, 246 Fed. 892 (C.C.A. 5), (cert. den. 246 U. S. 670); *United States* v. *American Surety Co. of N. Y.*, 172 F. (2d) 135 (C.C.A. 2), (cert. den. 337 U. S. 930); dissenting opinion of Judge Clark, in the case at bar.

ARGUMENT.

I.

The bond and exhibits create a separate and distinct liability for each successive period of twelve (12) months during the time of coverage, and contain no language effectively prohibiting that construction.

As stated in Reasons for Allowance of the Writ, petition, p. 3, and in Summary of Argument, p. 11, Federal Courts have differed sharply on this point. There has been no unanimity of opinion. Without unanimity, it cannot be said that the language used in the bond is without ambiguity. Nor it cannot be assumed, as stated in the majority opinion of the Court below, that "the Courts have consistently held liability to be limited, in the aggregate, to the amount stated in the bond (i.e. noncumulative)".

Upon examination, the following four cases cited in the majority opinion of the Court below (discussed *seriatim*) may be distinguished from the case at bar.

(1) In *Hack* v. *American Surety Co. of N. Y.*, 96 F. (2d) 939 (C.C.A. 7), cited in the majority opinion of the Lower Court, the Court, speaking through Judge Evans, on p. 945, said:

> "We reach our conclusion hesitatingly and confess our inability to rid ourselves of a serious doubt."

and, on a petition for rehearing, the Court again said, at p. 947:

"As stated in the original opinion the question is not entirely free from doubt, but the language in the renewal contract was, and still is, accepted by us as controlling . . ."

The Court then rested its decision on a clause in the contract which provided that:

". . . 'in no event shall the aggregate liability of the Surety for any one or more defaults of the principal during any one or more years of the suretyship under the bond hereinabove referred to, as extended by this or any other extension thereof, exceed the amount specifically set forth in the bond' . . ."

The provision in the case at bar differs materially from that of the *Hack* case, in that it provides that liability:

". . . 'Shall in no event, exceed in the aggregate the amount carried under the attached bond, at the time the attached bond becomes effective, on the employee causing such losses.' "

It is not unreasonable to assume that, had the bond in the *Hack* case read as in the case at bar, that Court would have rendered a decision in favor of Hack.

(2) *United States Fidelity & Guaranty Co.* v. *Barber*, 70 F. (2d) 220 (C.C.A. 6), cited in the majority opinion of the Lower Court, Judge Simons, at p. 226, in discussing the case of *Aetna Casualty & Surety Co.* v. *Commercial State Bank* (D.C.E.D. Ill.), 13 F. (2d) 474, (reversed on other grounds 19 F. (2d) 969 (C.C.A. 7)), and cases cited therein, said:

"There is no unanimity of holding, however, even in the case of bonds thus described . . ."

(3) *Brulatour* v. *Aetna Casualty & Surety Co.*, 80 F. (2d) 834 (C.C.A. 2), a case cited by the majority opinion of the Lower Court, distinguished *Maryland Casualty Co.* v. *Bank*,

246 Fed. 892 (C.C.A. 5), (cert. den. 246 U. S. 670), by stating that in the latter case:

> ". . . the first schedule and the receipt for the second yearly premium both indicated a definite time at which the coverage terminated. Florida Central & P. R. Co. v. American Surety Co., 99 F. 674 (C.C.A. 2), Proctor Coal Co. v. United States F. & G. Co., 124 F. 424 (C.C.Ga. 1903), and Campbell Milk Co. v. U. S. Fidelity & Guaranty Co., 161 App. Div. 738, 146 N.Y.S. 92 (2d Dept. 1914), similarly construed insurance capable of being read as separate yearly contracts because the facts showed yearly expiration dated."

Furthermore, in the *Brulatour* case, the plaintiff admitted by a letter to the defendant that they believed the loss was greatly in excess of the amount of the bond.

In the case at bar, we find no admission of the plaintiff that the loss was in excess of the bond, and we *do* find that the expiration dates, as indicated in the receipts for the premiums paid, were for several, successive, definite periods. (R. 20-24)

(4) The majority opinion, in the case at bar, discusses the case, *United States* v. *American Surety Co. of N. Y.*, 172 F. (2d) 135 (C.C.A. 2), (cert. den. 337 U. S. 930), and says:

> "That decision, which was by a divided court, dealt with a type of bond required by an act of Congress, and does not appear pertinent here."

Yet, Judge Swan, in his dissenting opinion, stated:

> "But I see no material difference between the bond at bar and the one construed in Montgomery Ward & Co. v. Fidelity & Deposit Co. of Md. 7 Cir., 162 F. 2d 264."

thus making no distinction between a bond required by an act of Congress and any other fidelity bond, insofar as principles of law are concerned.

A further quotation from this case seems pertinent, p. 138:

"On the other hand, the courts which find cumulative liability seem to be more impressed by practical considerations. 'We are the more persuaded to this view by the improbability that a practical business concern . . . would pay one company two premiums for a single right of recovery if it could by payment of the same sum to two separate insurance carriers procure recoverable insurance for two periods.' Standard Accident Ins. Co. v. Colingdale State Bank, 3 Cir., 85 F. 2d 375, 376. In Aetna Casualty & Surety Co. v. Commercial State Bank of Rantoul, D.C.E.D. Ill., 13 F. 2d 474, 476, reversed on other grounds, 7 Cir., 19 F. 2d 969, the court asks the pertinent question, 'What did he (the obligee) buy the second year?' and concludes that he must have bought a new contract of insurance. In Maryland Casualty Co. v. First Nat. Bank of Montgomery, Ala., 5 Cir., 246 F. 892, 900, certiorari denied 246 U. S. 670, 38 S. Ct. 345, 62 L. Ed. 931, the court points out that the renewal premium was equal in amount to the initial premium, and that therefore it should provide equal coverage, without diminishing the coverage for undiscovered defalcations in the previous period.

"We agree with Judge Smith in regarding these considerations as persuasive. It does not seem rational to believe that the United States would require a contract from a surety of so little practical value or that a company in business as a paid surety would be justified in contemplating that it had promised so little."

p. 139:

"The substantial and controlling point is that an annual premium was required and paid in the expectation of the obvious protection which that should afford."

The majority opinion in the case at bar quotes from this case, the quotation ending, "None of these cases is thus particularly helpful." Yet, in this quotation, the Court points out its reason for its holding in the *Brulatour* case, a case decided by the same circuit, 2 Cir., thirteen years previously, by stating that the "obligee voiced no objection" to the creation of a non-cumulative liability. In fact,

as has been pointed out on page 14, *supra,* the obligee wrote a letter to the insurer and stated that the loss exceeded the amount of the bond. And, yet, the majority opinion in the case at bar holds that the cases cited in that opinion are controlling, while the Court rendering that opinion followed the rule stated in *Aetna Casualty & Surety Co.* v. *Commercial State Bank,* (D.C.E.D. Ill), 13 F. (2d) 474, (reversed on other grounds 19 F. (2d) 969 (C.C.A. 7)).

In the latter case, Judge Lindley, after pointing out that a fidelity bond should be construed as an insurance contract and be liberally construed to accomplish the purpose for which they are made, citing cases, then, on p. 475, said:

> "Here defendant paid an annual premium for insurance. Under plaintiff's theory, if there were a loss of $10,000 the first year, not discovered until the end of the three years' period, then, though defendant had paid premiums for the second and third years, it would have no protection for those years, no insurance, for the reason that the penalty of the bond would be completely exhausted by the first year's losses, and nothing would remain to cover losses in the second and third years. In such case, the second and third years' premiums would be paid by defendant for nothing whatever. No sane man would say that this was the intention of defendant, and the court is most loathe to believe that it was the intent of plaintiff, a widely known insurance company, dependent upon the good will and esteem of the public and its customers for its commercial welfare, so to frame its contract of indemnity as to extract premiums from the insured without giving anything in return. Brief indeed would be its life of business prosperity and public esteem, were it known that it would be guilty of such a game of 'heads I win, tails you lose'. Rather than impute to it such an abhorrent suggestion of lack of commercial integrity and fair dealing, the court prefers to find as he believes the facts clearly indicate, that each year's premium was to buy one year's insurance of $10,000. There is no fact or circumstance warranting a finding that the parties intended that the first year's premium bought insurance of $10,000, but that the three years' premiums bought insurance of only $3,333 1/3 per year."

The Court then follows the rule stated in *Maryland Casualty Co.* v. *Bank*, 246 Fed. 892 (C.C.A. 5), (cert. den. 246 U. S. 670), and other cited cases supporting that view, and, at p. 476, says:

> "Courts in which an opposite conclusion has been reached have grounded their decisions upon a finding that the parties by their contract evidenced an intention to restrict the liability of plaintiff to one penalty without regard to the number of premiums paid."
>
> • • •
>
> "So the question here is, What did the defendant buy the first year, what did he buy the second year, and what did he buy the third year? When the first year ended, all future liability was at an end, unless and until another year's premium—the same as, or, as here, more than, had been paid the first year—should be paid. By the payment of that premium and its acceptance the plaintiff said as plainly as if it had made a new bond, that it, in consideration for the premium, would stand for the same insurance for that year as it had for the first. Any other conclusion arises from a false conception of the situation and relations of the parties."

More apt cases are believed to be determinative of the case at bar. In *Globe Indemnity Co.* v. *Wolcott & Lincoln*, 152 F. (2d) 545 (C.C.A. 8), where a bond was issued for $10,000.00 for losses during period 6/6/40 to 6/6/43, losses to be discovered within twelve months of cancellation, termination or expiration, and a second bond was issued for the period 6/6/43 to 6/6/46, both bonds had a "Superseded Suretyship Rider" attached. Within twelve months of 6/6/43, the insured discovered a loss under the first bond in excess of $10,000.00, and a loss in excess of $10,000.00 under the second bond. The insured demanded $20,000.00, that is $10,000.00 under each bond. Surety tendered $10,000.00. The "Rider" provided:

> "That liability under the attached bond as extended by this rider for loss or losses under the prior bond on

account of any office shall not exceed the amount carried on such office under the attached bond at the time the attached bond becomes effective . . ."
"That liability under the prior bond and the attached bond on account of any office shall not be cumulative in amounts . . ."

(Note the similarity of this Rider with Rider in case at bar.) (R. 17)

The Lower Court gave judgment to the plaintiff for $20,000.00, stating, in extract from District Court opinion, in footnote, p. 547:

" 'If susceptible of the interpretation placed by counsel, then the rider becomes a veritable trap to deceive and ensnare its loyal and persistent policy-holders under the pretext of liberalizing its obligations. It accepts on the one hand a full premium payment and on the other it proposes to give nothing for such payment. It would be a discrimination in violation of law.' "

In affirming the decision of the District Court, Judge Sanborn, on p. 548, said:

"The provision of paragraph 4 of the rider attached to the second bond that 'liability under the prior bond and the attached bond on account of any office shall not be cumulative in amounts', cannot, we think, be taken and understood to be a limitation of the aggregate amount of the liabilities of the appellant under both bonds. The liability of the appellant under the first bond and its liability under the second bond were not cumulative liabilities, but were separate liabilities, for separate amounts, under separate contracts of insurance. Hence an agreement that these distinct liabilities should not be cumulative in amounts would be meaningless."

In *Proctor Coal Co.* v. *United States Fidelity & Guaranty Co.* (C.C.N.D. Ga.), 124 Fed. 424, the Court construed the language of the bond wherein the surety agreed to make good losses "occurring during the continuance of this bond

or any renewal thereof" to mean "that each renewal is a separate and distinct contract" (p. 427), and at p. 430, "The original bond and each renewal stands for the malfeasance of the employee during the continuance of each."

As a further evidence that there is a conflict in the opinion of judges who render decisions on this question of the liability under fidelity bonds, we quote from the dissenting opinion of Judge Clark in the case at bar:

> "This is apparently a case of first instance in this jurisdiction. Courts in other jurisdictions, including many Federal Courts and many respectable state courts, have been in violent disagreement. . . . It overlooks the salient fact of the improbability that any one except a congenital idiot would be likely to go on paying premiums on an extinct bond from which there was no possibility of protection in the future.
>
> "The majority of this court as I understand their contention is that under the bond all right to indemnity was exhausted in 1945 but that the bonding company was within its rights in going right ahead billing and collecting for periods in which absolutely no protection was afforded. With this view I completely disagree. I regard such conduct on the part of the surety as common thievery. Great stress is laid by the majority on the provision in the bond that 'the payment of annual premiums during such terms shall not render the amount of this bond cumulative from year to year'.
>
> "This term is certainly ambiguous. It might mean, as the bonding company contends, that one indemnity of $5,000.00 is all that can ever be paid under this bond or any renewal of it.
>
> "The far more reasonable construction is that it simply means that the coverage on years when no loss was suffered cannot be carried over to cover losses in a subsequent year when losses were in excess of $5,000.00.
>
> "The mere fact that judges of the courts of the United States and various State Courts have so sharply differed as to the construction to be placed upon this language, and similar language, and the further fact that

the judges of this court differ widely in their views is strong evidence of its ambiguity.

"I think the judgment of the District Court should be reversed outright."

II.

Provisions of a Superseded Suretyship Rider which refers to a prior "fidelity suretyship" cannot be held to vary the terms of the bond to which it is attached.

The majority decision in the lower court conflicts with the construction placed by other courts on the application of a Superseded Suretyship Rider. The lower court would place great emphasis upon the limited liability of the defendant by use of the language, "shall not be cumulative in amounts" and "shall, in no event, exceed in the aggregate the amount carried in the attached bond."

Examination of the words of the Rider 337 (R. 15, 16, 17) make it clear that the Rider referred to a certain "fidelity suretyship" as evidenced by a "Position Schedule Bond issued effective as of March 17, 1941." The fidelity suretyship thus mentioned was a bond existing prior to the bond in suit. The purpose of the Rider appears clearly to be to permit the plaintiff to claim losses which occurred under the prior bond but not discovered by plaintiff until a time subsequent to the expiration of the period of limitation after the termination of the prior bond.

Plaintiff's claim is not based in any part upon losses under the prior bond effective March 17, 1941. Plaintiff's claim is based solely upon the bond effective March 17, 1942, and annual premiums thereof, bills for, and payment of renewal premiums thereafter.

As the provisions of the Rider refer to a prior "fidelity suretyship", it cannot be held to vary the terms of the bond to which it was attached. It is, therefore, clear that the limitation of recovery applicable to a prior bond has no effect on recovery permissible under the bond in suit.

The Court so held in construing an appended Rider identical in all material respects with the one in the case at bar in *Globe Indemnity Co.* v. *Wolcott & Lincoln, supra,* and in *Maryland Casualty Co.* v. *Tulsa Loan Co.,* 83 F. (2d) 14 (C.C.A. 10), 105 A.L.R. 529, where the Court said:

> "Accordingly, the rider, including its fixation of maximum recovery, has no effect here."

Also in *Hartford Accident & Indemnity Co.* v. *Collins-Dietz-Morris Co.,* 80 F. (2d) 441 (C.C.A. 10), the Court said:

> ". . . plaintiff did not seek recovery upon that rider, and the court was right in not submitting the question of its effect to the jury."

III.

The language on the bond is ambiguous, is susceptible of more than one interpretation, and should be construed most strongly against the insurer.

The contract between the plaintiff and defendant evidenced by the so-called "Blanket Position Fidelity Bond" is one of insurance. *Aetna Casualty & Surety Co.* v. *Commercial State Bank* (D.C.E.D. Ill.), 13 F. (2d) 474, (reversed on other grounds, 19 F. (2d) 969 (C.C.A. 7)), and *Underwriting Members of Lloyds* v. *California Fruit Growers Exchange,* 136 F. (2d) 560, 561 (C.C.A. 9, 1943). It is uniformly held that, if an insurance policy is so drawn as to require interpretation and to be fairly susceptible of two different constructions, the one will be adopted that is most favorable to the insured, and that the object to insure against loss should not be defeated by any narrow interpretation of its provisions, nor by adopting a construction favorable to the company, if there be another construction. *First Nat. Bank* v. *Hartford Fire Ins. Co.,* 95 U. S. 673, 24 L. ed. 563; *Thompson* v. *Phenix Ins. Co.,* 136 U. S. 287, 34 L. ed. 408; *American Surety Co. of N. Y.* v. *Pauly,* 170 U. S.

133, 42 L. ed. 977; *Hartford Accident & Indemnity Co.* v. *Swedith Methodist Aid Assn.*, 92 F. (2d) 649 (C.C.A. 7); *Pennsylvania Indemnity Fire Corp.* v. *Aldridge*, 73 App. D. C. 161, 117 F. (2d) 774; *Carter* v. *Provident Ins. Co.*, 74 U. S. App. D. C. 348, 122 F. (2d) 960; *Stinson* v. *New York Life Insurance Co.*, 83 U. S. App. D. C. 115, 167 F. (2d) 233; *Hayes* v. *Home Life Ins. Co.*, 83 U. S. App. D. C. 110, 168 F. (2d) 152; *Phoenix Mutual Life Ins. Co.* v. *Flynn*, 83 U. S. App. D. C. 381, 171 F. (2d) 982.

For further evidence of ambiguity, see the Court's expression of ambiguity in *Hack* v. *American Surety Co. of N. Y.*, 96 F. (2d) 939, p. 945, 947, and *United States Fidelity & Guaranty Co.* v. *Barber*, 70 F. (2d) 220, 226, both cases cited in the majority opinion of the Lower Court, and noted on pages 12 and 13, *supra*.

CONCLUSION.

The decision of the Court below involves an important question relating to the interpretation and construction of certain ambiguous language contained in Fidelity Bonds issued by an insurer for the purpose of indemnifying an employer for defalcations committed by an employee; its decision is in conflict with decisions of other Circuit Courts; and a writ of certiorari should be granted and the case should be reviewed and reversed.

Respectfully submitted,

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